APPENDIX

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 09-5807

[Filed July 29, 2010]

BART MCQUEARY, *Plaintiff-Appellant,* v. JACK CONWAY, Attorney General of the Commonwealth of Kentucky, *Defendant-Appellee.*

Appeal from the United States District Court for the Eastern District of Kentucky at Frankfort. No. 06-00024—Karen K. Caldwell, District Judge.

Argued: April 22, 2010

Decided and Filed: July 29, 2010

Before: GUY, BOGGS and SUTTON, Circuit Judges.

COUNSEL

ARGUED: William E. Sharp, AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, Louisville, Kentucky, for Appellant. Tad Thomas, OFFICE OF THE KENTUCKY ATTORNEY GENERAL, Frankfort, Kentucky, for Appellee. **ON BRIEF:** William E. Sharp, David A. Friedman, AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, Louisville, Kentucky, for Appellant. Tad Thomas, Lisa K. Lang, OFFICE OF THE KENTUCKY ATTORNEY GENERAL, Frankfort, Kentucky, for Appellee.

OPINION

SUTTON, Circuit Judge. In 2006, Bart McQueary challenged the validity of a Kentucky law placing limits on protests at military funerals, claiming that the law violated his free-speech rights under the First and Fourteenth Amendments. The district court granted McQueary's motion to enjoin enforcement of the law on a preliminary basis, soon after which Kentucky repealed the relevant provisions of the statute. The Commonwealth's voluntary repeal of the law, the parties now agree, mooted McQueary's § 1983 action. Yet the parties take sides over whether, in the aftermath of the Commonwealth's repeal of the law, McQueary is a "prevailing party" eligible for attorney's fees under § 1988.

I.

In March 2006, the Kentucky legislature added three misdemeanors to its criminal code, all designed to discourage protests by the Westboro Baptist Church, whose members have become known for staging anti-homosexual protests at military funerals—a practice that McQueary's attorney acknowledges is "controversial (and offensive to many)," R.43 at 7. *See* 2006 Ky. Laws Ch. 50–51; *Snyder v. Phelps*, 580 F.3d 206, 211–12 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 1737 (2010). In full, the three new misdemeanors read as follows:

> A person is guilty of disorderly conduct in the first degree when he or she:
>
> > (a) In a public place and with intent to cause public inconvenience, annoyance, or alarm, or wantonly creating a risk thereof:
> >
> > > 1. Engages in fighting or in violent, tumultuous, or threatening behavior;
> > > 2. Makes unreasonable noise; or
> > > 3. Creates a hazardous or physically offensive condition by any act that serves no legitimate purpose; and
> >
> > (b) Acts in a way described in paragraph (a) of this subsection within three hundred (300) feet of a:
> >
> > > 1. Cemetery during a funeral or burial;
> > > 2. Funeral home during the viewing of a deceased person;
> > > 3. Funeral procession;

4. Funeral or memorial service; and

(c) Knows that he or she is within three hundred (300) feet of an occasion described in paragraph (b) of this subsection.

2006 Ky. Laws Ch. 50 § 1(1), *codified as amended at* Ky. Rev. Stat. § 525.055(1).

A person is guilty of disrupting meetings and processions in the first degree when, with intent to prevent or disrupt a funeral or burial, funeral home viewing of a deceased person, funeral procession, or funeral or memorial service for a deceased person, he or she does any act tending to obstruct or interfere with it physically or makes any utterance, gesture, or display designed to outrage the sensibilities of the group attending the occasion.

2006 Ky. Laws Ch. 50 § 3, *codified at* Ky. Rev. Stat. § 525.145(1).

A person is guilty of interference with a funeral when he or she at any time on any day:

(a) Blocks, impedes, inhibits, or in any other manner obstructs or interferes with access into or from any building or parking lot of a building in which a funeral, wake, memorial service, or burial is being conducted, or any burial plot or the parking lot of the cemetery in which a funeral, wake, memorial service, or burial is being conducted;

> (b) Congregates, pickets, patrols, demonstrates, or enters on that portion of a public right-of-way or private property that is within three hundred (300) feet of an event specified in paragraph (a) of this subsection; or
>
> (c) Without authorization from the family of the deceased or person conducting the service, during a funeral, wake, memorial service, or burial:
>
> > 1. Sings, chants, whistles, shouts, yells, or uses a bullhorn, auto horn, sound amplification equipment, or other sounds or images observable to or within earshot of participants in the funeral, wake, memorial service, or burial; or
> >
> > 2. Distributes literature or any other item.

2006 Ky. Laws Ch. 50 § 5.

Roughly one month after the passage of these laws, Bart McQueary, a Kentucky resident who had joined these protests in the past and wanted to do so again, filed a lawsuit against Kentucky's Attorney General in federal court. *See* R.1. McQueary claimed that §§ 5(b) and 5(c) of the March 2006 Act, located in the third of the new laws, violated his First and Fourteenth Amendment rights in several ways. He wanted to "congregate[], picket[]" and "demonstrate[]" in a non-disruptive way on public rights-of-way within 300 feet of funerals, yet the 2006 Act appeared to prevent him from doing so. 2006 Ky. Laws Ch. 50 § 5(b). He wanted

to make sounds and display images "observable to or within earshot of" funerals without permission from the family of the deceased and without disrupting the funeral, yet the 2006 Act appeared to prevent him from doing so. 2006 Ky. Laws Ch. 50 § 5(c). And he wished to "distribute[] literature" during his funeral protests, yet the 2006 Act appeared to prohibit him from doing so. 2006 Ky. Laws Ch. 50 § 5(c). McQueary asked the district court to declare §§ 5(b) and 5(c) unconstitutional on their face and to enjoin their enforcement.

In September 2006, the district court preliminarily enjoined enforcement of §§ 5(b) and 5(c), finding it likely that the provisions were unconstitutionally overbroad. *See McQueary v. Stumbo* (*McQueary I*), 453 F. Supp. 2d 975, 997 (E.D. Ky. 2006). Six months later, in March 2007, the Kentucky legislature repealed these two subsections of the 2006 Act. *See* 2007 Ky. Laws Ch. 107 § 3.

After Kentucky repealed the challenged provisions, the district court dismissed the lawsuit as moot. *See McQueary v. Conway* (*McQueary II*), 634 F. Supp. 2d 821, 830 (E.D. Ky. 2009). In the same order, the court denied McQueary's request for attorney's fees. The court reasoned that McQueary did not directly benefit from the preliminary injunction because the central premise of its likelihood-of-success conclusion—overbreadth—did not necessarily establish that McQueary could picket the way he wanted to. *See id.* at 832–33. And because McQueary did not challenge other provisions of the 2006 Act prohibiting "violent, tumultuous, or threatening behavior" near funerals, Ky. Rev. Stat. Ann. § 525.055, the court thought it likely that, even after the court's preliminary

injunction and the legislature's repeal of the challenged statutes, McQueary would not be able to engage in the funeral protests, *McQueary II*, 634 F. Supp. 2d at 833. McQueary appeals the court's rejection of his request for fees.

II.

In trying to resolve the thorny questions raised by McQueary's appeal – whether or when the winner of a preliminary injunction may be treated as a "prevailing party" entitled to attorney's fees—a few basics are in order. There is no common law right to attorney's fees. Under the "American Rule," the "general practice" is not to award fees to prevailing parties "absent explicit statutory authority." *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598, 602 (2001). Under § 1988, as under several other fee-shifting statutes, Congress has explicitly empowered the courts to grant fees to parties who win § 1983 actions, among other civil rights actions:

> In any action or proceeding to enforce a provision of . . . [§] 1983 . . . , the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. . . .

42 U.S.C. § 1988(b); *see, e.g.*, *id.* § 3613(c)(2) (authorizing fee awards to the "prevailing party" in Fair Housing Amendments Act cases); *id.* § 12205 (same in Americans with Disabilities Act cases); *id.* § 2000e-5(k) (same in Civil Rights Act cases); *id.* § 1973l(e) (same in Voting Rights Act cases).

"[P]revailing party" is a "legal term of art," *Buckhannon*, 532 U.S. at 603, one that two recent decisions of the Supreme Court help to define. In *Buckhannon*, the plaintiff sought an injunction barring enforcement of a West Virginia statute and obtained a court-ordered preliminary injunction, though one to which West Virginia consented. *See id.* at 601. Two months after the district court rejected the State's sovereign immunity defense and one month after it denied the State's motion for summary judgment, the State repealed the statute, after which the district court dismissed the case as moot and denied the plaintiff's request for attorney's fees. *See id.* The Supreme Court affirmed the denial of fees, rejecting the "catalyst theory" for awarding fees, under which a plaintiff "prevailed" if he "achieve[d] the desired result because the lawsuit brought about a voluntary change in the defendant's conduct," such as a legislative repeal of a challenged statutory provision. *Id.* at 601–02. That theory, the Court reasoned, overlooks the legal reality that "prevailing party" covers only parties "in whose favor a judgment is rendered." *Id.* at 603 (internal quotation marks omitted). A defendant's voluntary change, even one precipitated by litigation, does not amount to "a court-ordered change in the legal relationship" between the plaintiff and defendant, as required to establish prevailing-party status. *Id.* at 604.

In *Sole v. Wyner*, 551 U.S. 74, 86 (2007), the Court established that the "court-ordered change in the legal relationship" between a plaintiff and defendant must be "enduring" and irrevocable. *Id.* That did not happen in *Sole* because the trial court dissolved the preliminary injunction it entered in favor of the claimant. A preliminary injunction, the Court held,

does not establish prevailing-party status if it is "reversed, dissolved, or otherwise undone by the final decision in the same case," because § 1988 requires lasting relief, not the temporary, "fleeting success" such an injunction represents. *Id.* at 83; *see also id.* at 82 n.3. *Sole*, however, reserved the question presented here: "whether, in the absence of a final decision on the merits . . . , success in gaining a preliminary injunction may sometimes warrant an award of counsel fees." *Id.* at 86. *See also Hewitt v. Helms*, 482 U.S. 755, 760 (1987) (rejecting fee request for "interlocutory" victory and explaining that "[r]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail").

After *Buckhannon* but before *Sole*, our court considered whether the winner of a preliminary injunction was a "prevailing party." In *Dubuc v. Green Oak Township*, 312 F.3d 736 (6th Cir. 2002), a landowner filed a lawsuit against a township, charging the township with refusing to permit him to divide his lot in retaliation for his exercise of free-speech rights. Early in the lawsuit, the claimant obtained a preliminary injunction ordering the township to issue him a temporary certificate of occupancy as long as he complied with seven conditions. *Id.* at 753. The district court denied the request for "interim fees," and we affirmed. *See id.* at 753–54. In the context of a preliminary injunction, we reasoned, "there is only prevailing party status if the injunction represents 'an unambiguous indication of probable success on the merits, and not merely a maintenance of the status quo ordered because the balance of equities greatly favors the plaintiff.'" *Id.* at 753 (quoting *Webster v. Sowders*, 846 F.2d 1032, 1036 (6th Cir. 1988)). Because

the injunction was not a "clear victory" for the claimant and was issued only in connection with several "conditions" imposed on the claimant, *Dubuc* upheld the district court's denial of fees. *Id.* at 754. The claimant's objective in the lawsuit, we concluded, was not to obtain a temporary certificate of occupancy, which is all that the preliminary injunction provided, but to obtain damages for alleged violations of his constitutional rights, which the court ultimately denied. *Id.* (Because *Dubuc* predates *Sole*, the court never addressed a more basic reason for denying that particular fee request: A claimant may not obtain interim attorney's fees for a preliminary injunction that is later dissolved. *See Sole*, 551 U.S. at 83.)

There are two more threads to the prevailing-party inquiry. One, to be a prevailing party, the plaintiff must obtain a "material" change in the legal relationship between himself and the defendant. *Sole*, 551 U.S. at 82, 86 (internal quotation marks and modifications omitted). A material change "directly benefit[s]" a plaintiff by modifying the defendant's behavior toward him. *Farrar v. Hobby*, 506 U.S. 103, 111 (1992); *see also Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989). Absent a direct benefit, the plaintiff achieves only a symbolic victory, which § 1988(b) does not compensate. *See Farrar*, 506 U.S. at 113; *Tex. State Teachers Ass'n*, 489 U.S. at 792.

Two, the idea behind § 1988 is to award fees to deserving parties, not to generate "satellite" disputes over fees, *City of Burlington v. Dague*, 505 U.S. 557, 566 (1992); *see Buckhannon*, 532 U.S. at 610, which prompt "a second major litigation," *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). In assessing fee

requests, the Court thus tends to eschew fact-based and speculative inquiries into why government bodies altered their conduct because they (1) tend to "distract[] . . . from," not further, § 1988's goal of encouraging adequate representation for civil rights plaintiffs, *Tex. State Teachers Ass'n*, 489 U.S. at 791, and (2) waste scarce judicial resources on questions "which [are] almost impossible to answer," *id.*; *see Dague*, 505 U.S. at 566.

That is all well and good. But none of this readily resolves today's case: McQueary does not invoke the "catalyst" theory; he did not ultimately lose on the merits; the preliminary injunction, as we will explain shortly, materially changed the relationship between the parties; and the preliminary injunction turned at least in part on the district court's assessment of the merits. Keeping in mind the Court's admonishment that fee inquiries should not generate satellite litigation, are there any other considerations that might clarify the inquiry? Several possibilities come to mind:

* Perhaps, in view of the nature of a *preliminary* injunction, success on this type of interim relief *never* suffices. The statute after all refers to "the" prevailing party, not "a" prevailing party, 42 U.S.C. § 1988(b), suggesting that the only court-ordered change in the legal relationship between the parties that matters should be a lasting one, namely the change that culminates in a *final* judgment. Otherwise, individuals *and* States—both "prevailing" parties at times who "may" obtain fees—might seek fees for all manner of interim victories whenever for one reason or another the case does not proceed to final judgment. *Cf. Hewitt*, 482 U.S. at 760 (surviving a motion to dismiss "is not

the stuff of which legal victories are made"). Adding force to the idea that a "preliminary" victor is never a prevailing party is this reality: Our review of a preliminary injunction ruling, even one that turns on the merits and even one that is resolved through a published opinion, is not binding on the panel that reviews the ultimate final injunction decision. *See Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007); *Smith Wholesale Co., Inc. v. R.J. Reynolds Tobacco Co.*, 477 F.3d 854, 873 n.13 (6th Cir. 2007).

But this approach, clear as it might be, fails to account for fact patterns in which the claimant receives everything it asked for in the lawsuit, and all that moots the case is court-ordered success and the passage of time. When protesters seek an injunction to exercise their First Amendment rights at a specific time and place—say to demonstrate at a Saturday parade—a preliminary injunction will give them all the court-ordered relief they need and the end of the parade will moot the case. In what way are such claimants not prevailing parties? We think they are. *See Young v. City of Chicago*, 202 F.3d 1000, 1000 (7th Cir. 2000) (awarding fees to protestors who obtained a preliminary injunction to protest at the 1996 Democratic National Convention, which was the only relief sought). The same is true of a government employee who seeks to exclude an unconstitutionally obtained report from an administrative hearing and obtains a preliminary injunction that irrevocably excludes the report. *See Watson v. County of Riverside*, 300 F.3d 1092, 1095–96 (9th Cir. 2002). So also for a plaintiff who seeks to delay enforcement of a statute until a certain event occurs—say a scheduled public

referendum—and the preliminary injunction brings about that result. *Cf. Thomas v. Nat'l Sci. Found.*, 330 F.3d 486, 493 (D.C. Cir. 2003).

Not all preliminary injunctions, as these examples show, have merely a catalytic effect. The defendants in these cases did not voluntarily change their conduct. An immediately enforceable preliminary injunction compelled them to. And in each instance, the plaintiffs obtained all of the relief they requested once the preliminary injunction served its purpose. *See N. Cheyenne Tribe v. Jackson*, 433 F.3d 1083, 1086 (8th Cir. 2006); *Watson*, 300 F.3d at 1096.

The plaintiffs in all of these cases, it is true, might have avoided the "preliminary" label attached to their victories by asking the courts to convert their motions for a preliminary injunction into motions for a final injunction. *See* Fed. R. Civ. P. 65(a)(2). Yet Rule 65 is not the Rosetta Stone to prevailing-party inquiries. A district court may, but it does not have to, grant Rule 65 requests, and nothing about the nature of the prevailing-party inquiry suggests that it should turn on whether a district court happens to embrace this administrative streamlining device. In the final analysis, the *preliminary* nature of the relief does not by itself provide a ground for *never* granting fees.

* Perhaps preliminary-injunction winners are never eligible for fees for a *different* reason. In *Sole*, the Court held that a preliminary injunction does not establish prevailing-party status if it is "reversed, dissolved, or otherwise undone by the final decision in the same case." 551 U.S. at 83. When a case becomes moot, courts often vacate their earlier rulings on the theory that a ruling should not stand when the party

opposing it is deprived of a chance to obtain a final ruling on the issue or to seek appellate review of it—due to events outside of the party's control, such as the defendant's voluntary cessation of conduct. *See Alvarez v. Smith*, 558 U.S. ___, 130 S. Ct. 576, 581 (2009); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950); *cf. U.S. Philips Corp. v. KBC Bank N.V.*, 590 F.3d 1091, 1093–94 (9th Cir. 2010) (collecting cases holding that preliminary injunctions automatically dissolve upon final judgment).

The *Munsingwear* doctrine suggests a potentially straightforward approach to the fees question: *Sole* says that "dissolved" or "otherwise undone" preliminary injunctions do not warrant fees; mootness generally requires a court to vacate its earlier rulings, including any preliminary injunction granted in the case; fees for preliminary injunctions therefore are not permitted under *Sole*. But this approach again fails to account for the instances in which a party has prevailed by every measure of victory, as illustrated above. The *Munsingwear* rule, moreover, is not as clear as day: It has exceptions of its own, *see, e.g.*, *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24 (1994) (*Munsingwear* does not apply to voluntary settlements), and vexing issues often arise over whether a case is moot in the first place, *see, e.g.*, *Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (a defendant's voluntary change in conduct moots a case only if it is "absolutely clear" alleged wrongdoing is unlikely to recur); *Honig v. Doe*, 484 U.S. 305, 318 (1988) (a case avoids mootness if "capable of repetition, yet evading review"). All of these exceptions have little to do with the status of a party's victory, precluding us from

saying that preliminary-injunction winners are *never* eligible for prevailing-party status on this basis alone.

* Perhaps instead preliminary-injunction winners are *always* eligible for fees. *Buckhannon* says that "a court-ordered change in the legal relationship" between the plaintiff and defendant suffices to establish prevailing-party status, 532 U.S. at 604, and the granting of a preliminary injunction assuredly changes the legal relationship between the parties, permitting the claimant to do something that the defendant previously resisted. Rather than doing too little, however, this approach does too much. Some preliminary injunctions have nothing to do with the merits, offering no insight into whether one party or the other will prevail at the end of the case. Some initial injunctions, sometimes called stay-put or status quo injunctions, turn more on the grave risks of irreparable harm to one party or to the public interest than on the legal virtues of the parties' positions. *See Webster v. Sowders*, 846 F.2d 1032, 1036 (6th Cir. 1988) (denying fees to a plaintiff who obtained an injunction "because the balance of the equities greatly favor[ed]" maintaining "the status quo").

Several courts have rejected fee requests for obtaining such injunctions. *See Dearmore v. City of Garland*, 519 F.3d 517, 524 (5th Cir. 2008) (granting fees only if the claimant obtains "an unambiguous indication of probable success on the merits"); *N. Cheyenne Tribe v. Jackson*, 433 F.3d 1083, 1086 (8th Cir. 2006) (denying fees where injunction "granted only interim relief that preserved the status quo"); *Thomas*, 330 F.3d at 493 (denying fees where injunction "merely preserved the status quo"); *John T. ex rel. Paul T. v. Del. County Intermediate Unit*, 318

F.3d 545, 558 (3d Cir. 2003) (denying fees where injunction was "not based on the merits of [the plaintiff's] claims"); *Race v. Toledo-Davila*, 291 F.3d 857, 858–59 (1st Cir. 2002) (denying fees where injunction merely safeguarded claimant's rights during the litigation). No court to our knowledge holds that the victors of such holding-pattern injunctions and nothing more automatically receive fees, though one court comes close. *Cf. Richard S. v. Dep't of Developmental Servs. of Cal.*, 317 F.3d 1080, 1088–89 (9th Cir. 2003).

A similar defect defeats a related intuition, permitting fees whenever the nature of the victory is one that Congress has permitted the losing party to appeal. That would be true of final judgments, *see* 28 U.S.C. § 1291, *and* of the granting or the denial of preliminary injunctions, *see* 28 U.S.C. § 1292(a). But that rule, too, picks up orders that have nothing to do with success on the merits. Even aside from the stay-put injunctions identified above, it would extend to class certification orders, which Congress has permitted parties immediately to appeal (with the permission of the court of appeals). *See* Fed. R. Civ. P. 23(f). "A procedural victory that may be a way station to utter substantive defeat creates no right to fees." *Richardson v. Penfold*, 900 F.2d 116, 119 (7th Cir. 1990); *see Hardt v. Reliance Standard Life Ins. Co.*, No. 09-448, 560 U.S. ___, slip op. at 11–12 (May 24, 2010) (holding that "purely procedural victor[ies]" do not qualify for fees even under standards "less stringent" than the prevailing-party requirement).

All of this leaves us with a contextual and case-specific inquiry, one that does not permit us to say that preliminary-injunction winners always are, or never

are, "prevailing parties." In the aftermath of *Buckhannon* and *Sole*, however, we can say that the "preliminary" nature of the relief—together with the requirement that a prevailing-party victory must create a lasting change in the legal relationship between the parties and not merely "catalyze" the defendant to voluntary action—will generally counsel against fees in the context of preliminary injunctions. With these considerations in mind, we turn to the district court's explanation for denying McQueary's fee request.

First, the court denied fees on the ground that McQueary did not "directly benefit[]" from the 2006 preliminary injunction. That is not so, however. Before the injunction, Kentucky could prosecute McQueary for holding a large, controversial sign on a public sidewalk near a funeral, *see* 2006 Ky. Laws Ch. 50 §§ 5(b), (c); it could prosecute him for quietly distributing anti-military literature to mourners entering a funeral home, *see id.* § 5(c); and it could prosecute him for singing songs of protest that the funeral party could hear but that did not disrupt the funeral, *see id.* After the injunction, McQueary could do all of these things without fear of prosecution under these laws. No one disputes that Kentucky would have prosecuted McQueary in the absence of an injunction, establishing that this court-ordered freedom materially changed Kentucky's behavior toward him—at least temporarily. *See DiLaura v. Township of Ann Arbor*, 471 F.3d 660, 670 (6th Cir. 2006); *Berger v. City of Mayfield Heights*, 265 F.3d 399, 406 (6th Cir. 2001).

Second, in explaining its "direct benefit" ruling, the court added that *other* Kentucky laws would prohibit

McQueary's proposed protests. But why should we assess McQueary's prevailing-party status based on statutes he never challenged? That is not the norm. In considering whether a claimant directly benefitted from litigation, we usually measure the plaintiff's gain based on the relief requested in his complaint, not based on the practical significance of the relief obtained. *See Farrar*, 506 U.S. at 111–12; *Hewitt*, 482 U.S. at 760–61; *DiLaura*, 471 F.3d at 670. Even a single dollar in nominal damages, the pinnacle of worthless relief, qualifies as a direct benefit. *See Farrar*, 506 U.S. at 112. In this instance, McQueary asked the district court to enjoin Kentucky from enforcing two provisions of Kentucky law, and the preliminary injunction temporarily did so. That the benefit came through a preliminary injunction may make a difference in the end to the fees request. But this aspect of the court's direct benefit analysis does not turn on that point: Its analysis defeats McQueary's request for fees no matter whether the court's order of relief comes in the form of a preliminary injunction or a final one.

There is a good reason for focusing on the relief the plaintiff requested, not the additional relief he might have requested. "A request for attorney's fees should not result in a second major litigation," *Hensley*, 461 U.S. at 437, yet an assessment of the practical significance of the relief obtained almost always will lead to collateral litigation over the relevance of these other laws. *Cf. Buckhannon*, 532 U.S. at 609–10 (raising similar concerns about looking outside the litigation to assess whether a plaintiff prevailed). To assess whether McQueary's proposed protests would violate other provisions of Kentucky law, the district court would need to develop a factual record defining

the precise contours of McQueary's proposed "non-disruptive" protests. Would he block access to funeral homes' driveways and doorways? *See* Ky. Rev. Stat. Ann. § 525.155. What precisely would he chant, sing or shout near funerals and how loudly would he do so? When does a noise become so loud or a sign so offensive that it "prevent[s] or disrupt[s] a funeral"? *See id.* § 525.145. These factual inquiries are difficult in and of themselves, but they are virtually impossible when it comes to protests not yet undertaken, only anticipated.

All of this would be prelude to a difficult legal inquiry. The district court would have to decide whether, under the "facts" of this hypothetical protest, McQueary would violate any other provisions of Kentucky law that the Attorney General might uncover. And that would require the court to assess any constitutional challenges McQueary might have to those provisions. The possibility of prosecution under an additional unconstitutional statute after all could not undermine the practical significance of McQueary's success. To say that this would create a costly side show divorced from the merits of the underlying dispute is an understatement. To say that it would lead to district court orders more in the nature of advisory opinions than fee determinations is an unvarnished reality. *Cf. Hall v. Beals*, 396 U.S. 45, 48 (1969).

In defending the district court's reasoning, the Attorney General argues that we owe deference to the court's finding that other provisions—restrictions on "violent, tumultuous, or threatening behavior" and "hazardous and physically offensive condition[s]" near funerals, Ky. Rev. Stat. Ann. § 525.055—"likely

prohibit" McQueary's proposed, controversial activities. *McQueary II*, 634 F. Supp. 2d at 832. But the district court made no fact findings on this point. It issued the preliminary injunction and denied the fee request based on the pleadings, leaving us nothing to which we could defer. *Id.*; *McQueary I*, 453 F. Supp. 2d at 979.

Nor do we see any basis for concluding that McQueary's proposed protests would violate other, unchallenged aspects of Kentucky law. McQueary alleges that he wants to protest "in a non-disruptive manner." R.1 ¶ 15; *see* R.1 ¶¶ 13–14. To deny the request for fees on the ground that his conduct would violate valid restrictions on "violent, tumultuous, or threatening behavior," we would have to do one of two things: assume that McQueary's pleadings misrepresent how he planned to behave or infer that non-disruptive protests involve threatening behavior. Either approach would alter our normal practice of accepting a complaint's factual allegations as true and of drawing all reasonable inferences in the plaintiff's favor when ruling without an evidentiary record. *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (following that rule when assessing standing); *Jones v. City of Cincinnati*, 521 F.3d 555, 559 (6th Cir. 2008) (following that rule in evaluating a motion to dismiss).

The Attorney General's argument is unavailing for another reason. A plaintiff crosses the threshold to "prevailing party" status by succeeding on a single claim, even if he loses on several others and even if that limited success does not grant him the "primary relief" he sought. *Tex. State Teachers Ass'n*, 489 U.S. at 790–91; *see also Farrar*, 506 U.S. at 111. The

significance of the relief obtained goes only to the amount of fees. *Eckerhart*, 461 U.S. at 434–35. Had McQueary challenged all of Kentucky's funeral-protest prohibitions as applied to him, but succeeded only in having §§ 5(b) and 5(c) enjoined as overbroad, he would still qualify as a prevailing party. The Attorney General offers no justification—and we see none—for denying the fees request *in toto* because McQueary chose to challenge fewer rather than more provisions of Kentucky law.

Third, the court justified its fee denial on the ground that the injunction was premised on overbreadth grounds, not on the ground that McQueary's proposed communications were constitutionally protected. This, too, is a theory that has nothing to do with the preliminary nature of the court's relief; it would apply equally to permanent injunctions. The theory does not work in either setting. When a plaintiff obtains the *greater* victory (striking a statute in all of its applications, *i.e.*, on its face) rather than the more narrow victory (striking the statute as applied only to his communications), he does not become *less* eligible for fees. "Prevailing parties" are winning parties, and a party who succeeds in showing that a law cannot be enforced in *any* of its applications due to overbreadth concerns is the epitome of a prevailing party—for he has won not just on behalf of himself but on behalf of many others as well. One of the justifications for § 1988 is that it allows individual citizens to act as "private attorney[s] general," *Tex. State Teachers Ass'n*, 489 U.S. at 793, making it odd to say that the litigant who truly acts on behalf of other citizens by bringing an overbreadth challenge is *not* entitled to fees.

Even if we focus on the effect of an overbreadth ruling solely with respect to McQueary, at any rate, how has he not prevailed? Whether premised on overbreadth grounds or as-applied grounds, the effect is the same: The injunction bars Kentucky from prosecuting McQueary under §§ 5(b) and 5(c) and thus alters the legal relationship between McQueary and the State.

At least four circuits agree that plaintiffs who prevail on overbreadth grounds may collect attorney's fees. *See Ways v. City of Lincoln*, 274 F.3d 514, 520 (8th Cir. 2001); *Phelps v. Hamilton*, 120 F.3d 1126, 1130 (10th Cir. 1997) (vagueness challenge); *Nash v. Chandler*, 848 F.2d 567, 572 (5th Cir. 1988); *Solomon v. City of Gainesville*, 796 F.2d 1464, 1466–67 (11th Cir. 1986). No circuit to our knowledge disagrees, and we are not prepared to be the first.

Fourth, the court briefly justified its denial of fees on an alternative theory—that "special circumstances" warrant the denial of fees. But the court never explained what made the circumstances surrounding this litigation "special" and thus has given us no basis for assessing this theory for denying fees.

The "special circumstances" exception apparently flows from *dicta* in *Hensley v. Eckerhart*, which says that district courts may deny fees to a prevailing party "in 'special circumstances' when an award would be 'unjust.'" 461 U.S. at 446. We have acknowledged the doctrine on several occasions and have observed that a non-prevailing party must make a "strong showing" to establish special circumstances. *Deja Vu v. Metro. Gov't of Nashville and Davidson County*, 421 F.3d 417, 422 (6th Cir. 2005). But we have never (to our

knowledge) found a "special circumstance" justifying the denial of fees. *Id.* (later developments in the law, which would prevent a party from prevailing if case were relitigated at time of fees determination, are not special circumstances); *see Wikol v. Birmingham Pub. Schs. Bd. of Educ.*, 360 F.3d 604, 611 (6th Cir. 2004) (a prevailing party's "bad acts" during course of litigation are not a special circumstance); *Morscott, Inc. v. City of Cleveland*, 936 F.2d 271, 273 (6th Cir. 1991) (a defendant's good faith in enacting challenged provision is not a special circumstance).

It is "extremely rare" to deny fees based on special circumstances in other circuits as well. *Saint John's Organic Farm v. Gem County Mosquito Abatement Dist.*, 574 F.3d 1054, 1064 (9th Cir. 2009) (internal quotation marks omitted); *but see Bateson v. Geisse*, 857 F.2d 1300, 1306 (9th Cir. 1988) (denying fees where court had to "engage in extensive supplemental research" because of prevailing party's woefully inadequate briefing). On remand, the district court remains free to explain why special circumstances exist here.

So far, we have explained why the district court's explanations for denying fees in this difficult case do not hold up. Yet we have not explained whether McQueary should collect fees—and with good reason. That question initially is for the district court, which had a ring-side view of the underlying proceedings, which is in the best position to make an initial cut at whether McQueary deserves fees for this preliminary injunction and which is given considerable deference over most aspects of the fees inquiry. *Buckhannon*, *Sole* and *Dubuc* make clear, we think, that, when a claimant wins a preliminary injunction and nothing

more, that usually will not suffice to obtain fees under § 1988. What remains unclear is when the occasional exceptions to that rule should apply, a contextual and case-specific inquiry that we ask the district court to undertake in the first instance.

III.

For these reasons, we reverse and remand for further proceedings.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 09-5807

[Filed July 29, 2010]

BART MCQUEARY,	)
Plaintiff - Appellant,	)
	)
v.	)
	)
JACK CONWAY, Attorney General	)
of the Commonwealth of Kentucky,	)
Defendant - Appellee.	)
	)

Before: GUY, BOGGS and SUTTON, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Kentucky at Frankfort.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is REVERSED and the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT FRANKFORT

CIVIL ACTION NO. 06-CV-24-KKC

[Filed June 26, 2009]

BART McQUEARY, PLAINTIFF,	)
v.	)
JACK CONWAY, *in his Official Capacity as Attorney General of the Commonwealth of Kentucky,* DEFENDANT.	)

*** *** *** *** ***

OPINION AND ORDER

This matter is before the Court on the parties' briefs regarding the issues of mootness and the plaintiff's entitlement to attorney's fees. For the following reasons, the Court finds that this matter is moot and that the plaintiff is not entitled to attorney's fees under 42 U.S.C. § 1988.

I. Procedural History.

The Plaintiff commenced this action with a complaint in which he charged that certain provisions of House Bill 333 (HB 333) and Senate Bill 93 (SB 93) (together, the "Act"), which former Kentucky Governor Ernie Fletcher signed into law on March 27, 2006, infringed upon his right to protest at funerals under the First and Fourteenth Amendments to the Constitution and were facially unconstitutional. (Rec. No. 1, Complaint ¶¶ 1-2, 18).

On September 26, 2006, this Court granted the Plaintiff's motion for a preliminary injunction finding he had shown a likelihood of success on the merits of his claim that certain provisions of the Act violated the First Amendment. *McQueary v. Stumbo*, 453 F.Supp.2d 975 (E.D.Ky. 2006). After the Court's ruling on the preliminary injunction, the General Assembly amended the Act to delete the challenged provisions and the remaining provisions of the Act were codified at KRS 525.055, KRS 525.145 and KRS 525.155.

The issues now before the Court are whether this matter has been mooted by the Kentucky General Assembly's amendment of the Act and whether the Plaintiff is entitled to attorneys' fees as the prevailing party under 42 U.S.C. § 1988.

A. Current Kentucky Law.

The provisions of the Act that were not challenged by the Plaintiff and are currently in effect prevent certain disorderly and disruptive conduct at funerals and certain conduct interfering with a funeral.

1) KRS 525.055 – Disorderly Conduct.

KRS 525.055 provides that a person is guilty of disorderly conduct in the first degree when he or she:

(a) In a public place and with intent to cause public inconvenience, annoyance, or alarm, or wantonly creating a risk thereof:

1. Engages in fighting or in violent, tumultuous, or threatening behavior;

2. Makes unreasonable noise; or

3. Creates a hazardous or physically offensive condition by any act that serves no legitimate purpose; and

(b) Acts in a way described in paragraph (a) of this subsection within three hundred (300) feet of a:

1. Cemetery during a funeral or burial;

2. Funeral home during the viewing of a deceased person;

3. Funeral procession;

4. Funeral or memorial service; or

5. Building in which a funeral or memorial service is being conducted; and

(c) Acts in a way described in paragraph (a) of this subsection at any point in time between

one (1) hour prior to the commencement of an event specified in paragraph (b) of this subsection and one (1) hour following its conclusion; and

(d) Knows that he or she is within three hundred (300) feet of an occasion described in paragraph (b) of this subsection.

2) **KRS 525.145 – Disrupting a Funeral.**

KRS 525.145 provides that a person is guilty of disrupting meetings and processions in the first degree when:

> with intent to prevent or disrupt a funeral or burial, funeral home viewing of a deceased person, funeral procession, or funeral or memorial service for a deceased person, he or she does any act tending to obstruct or interfere with it physically or makes any utterance, gesture, or display designed to outrage the sensibilities of the group attending the occasion.

Id.

3) **KRS 525.155 – Interference with a Funeral.**

KRS 525.155 provides that a person is guilty of interference with a funeral when:

> at any point in time between one (1) hour prior to the commencement of an event specified in this subsection and one (1) hour following its conclusion, he or she blocks, impedes, inhibits,

or in any other manner obstructs or interferes with access into or from any building or parking lot of a building in which a funeral, wake, memorial service, or burial is being conducted, or any burial plot or the parking lot of the cemetery in which a funeral, wake, memorial service, or burial is being conducted.

B. The Provisions Subject to this Court's Opinion and Order.

The Plaintiff challenged only Sections 5(1)(b) and (c) of the Act. Those provisions provided the following:

(1) A person is guilty of interference with a funeral when he or she at any time on any day:

. . . .

(b) Congregates, pickets, patrols, demonstrates, or enters on that portion of a public right-of-way or private property that is within three hundred (300) feet of [a funeral, wake, memorial service, or burial or any burial plot or the parking lot of the cemetery in which a funeral, wake, memorial services, or burial is being conducted]; or

(c) Without authorization from the family of the deceased or person conducting the service, during a funeral, wake, memorial service, or burial:

1. Sings, chants, whistles, shouts, yells, or uses a bullhorn, auto horn, sound amplification equipment or other sounds or images observable to or within earshot of participants in the funeral, wake, memorial service, or burial; or

2. Distributes literature or any other item.

The Plaintiff asserted that Sections 5(1)(b) and (c) were unconstitutional prior restraints on speech and were not narrowly tailored to serve a significant government interest and did not leave open alternative channels for communication. (Rec. No. 1, Complaint ¶ 17). He further asserted that Sections 5(1)(b) and (c) were overbroad. (Rec. No. 1, Complaint ¶¶19-20, 24). Finally, he asserted that Section 5(1)(c) unconstitutionally made speech on public property contingent upon the approval of a private party. (Rec. No. 1, Complaint ¶ 22).

C. The Plaintiff's Proposed Communications.

In his Complaint, the Plaintiff asserted that he had picketed funerals with the Westboro Baptist Church three times in Kentucky. (Rec. No. 1, Complaint ¶ 10). He stated that such protests are an effective way to convey the church's message. (Rec. No. 1, Complaint ¶ 11). He stated he waned to protest at future funerals but feared he would be prosecuted for violating Sections 5 (1)(b) and (c) of the Act. (Rec. No. 1, Complaint ¶ 12).

The Plaintiff stated that he wished to congregate, picket, or demonstrate on that portion of a public right-of-way that is within 300 feet of a funeral, wake, memorial service or burial[1] in a manner that does not, and is not intended to disrupt the event. (Rec. No. 1, Complaint ¶ 13).

The Plaintiff further stated he wished to make sounds and display images observable to or within earshot of funeral participants, in a manner that does not, and is not intended to, disrupt the funeral. The Plaintiff wished to make these sounds and display these images without seeking or obtaining authorization from the family of the deceased or person conducting the funeral. (Rec. No. 1, Complaint ¶ 14). The Plaintiff stated that he also wished to distribute literature in a non-disruptive manner without first obtaining the permission of the family of the deceased or person conducting the funeral. (Rec. No. 1, Complaint ¶ 15).

D. The Preliminary Injunction.

The Plaintiff moved for a preliminary injunction (Rec. No. 2) enjoining the Attorney General from enforcing Sections 5(1)(b) and (c). This Court granted the motion, finding that the provisions were content-neutral and, thus, were required to be narrowly tailored to serve a significant government interest and to leave open ample alternative channels of communication.

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[1] Throughout this Opinion, the Court will refer to all of the events covered by Sections 5(1)(b) and (c) – funerals, wakes, memorial services and burials – simply as "funerals."

The Court assumed, for purposes of the preliminary injunction motion, that the state had a significant interest in protecting funeral attendees from unwanted communications that are so obtrusive that they are impractical to avoid. However, the Court determined that the Plaintiff had established a likelihood of success on the merits of his claim that Sections 5(1)(b) and (c) burdened substantially more speech than necessary to prevent interference with a funeral or to protect funeral attendees from unwanted, obtrusive communications that are otherwise impractical to avoid.

The Court's reasoning is important to the current motion for attorney's fees and, thus, below is a lengthy excerpt from the Opinion:

> Section 5(1)(b) prohibits all congregating, picketing, patrolling, demonstrating or entering on property within 300 feet of a funeral whether such activities interfere with the funeral or not and whether such activities are authorized by funeral attendees or not. It prohibits such activity whether the persons involved in the activities are visible to funeral participants or not and whether they are making any sound that funeral participants can hear or not. Thus, in addition to prohibiting intrusive activities, Section 5(1)(b), prohibits activity that would not interfere with a funeral and prohibits communications that are neither necessarily unwanted nor so obtrusive that they cannot be avoided by the funeral attendees.
>
> Further, the 300-foot buffer zone is substantially larger than the 36-foot buffer zone upheld in *Madsen*, the 8-foot floating buffer

zone upheld in *Hill* and the single-resident zone upheld in *Frisby*. The 300-foot zone would encompass public sidewalks and streets and would restrict private property owners' speech on their own property. The zone is large enough that it would restrict communications intended for the general public on a matter completely unrelated to the funeral as well as messages targeted at funeral participants.

Likewise Section 5(1)(c)(1) prohibits all unauthorized sounds or images observable to or within earshot of funeral participants whether such sounds or images are capable of interfering with the funeral or not. Instead of prohibiting "unreasonable" or "interfering" sounds or images, the provision contains a blanket prohibition against any person making any image or sound perceptible to funeral attendees. Such a prohibition is substantially broader than necessary to prohibit interference with a funeral.

. . . Sounds that are simply "within earshot" of funeral attendees will not necessarily interfere with a funeral. Likewise, sounds that are simply "within earshot" of funeral attendees are not necessarily so obtrusive as to be impractical to avoid.

The "images observable" provision of Section 5(1)(c)(1) also burdens substantially more speech than necessary to prohibit interference with a funeral or to protect citizens from obtrusive, unavoidable images. Unlike sounds, images that are simply "observable" may be avoided by averting the eyes or, when the potential observers are indoors, by pulling the curtains.

Read literally, Section 5(1)(c)(2) prohibits all unauthorized distribution of literature occurring anywhere during any funeral. With no geographic restriction, this provision clearly burdens more speech than necessary. Further, even if the provision is read to prohibit only the distribution of literature where such distribution is observable to or within earshot of funeral participants, the provision burdens substantially more speech than necessary to prevent interference with the funeral or to protect citizens from unwanted, obtrusive communications.

Moreover, the Court cannot construe the provisions as prohibiting only sounds or images that are "unreasonable," "outrageous," "disruptive," or "threatening," or that "tend to obstruct or interfere with" a funeral. Such sounds and images are already prevented in other sections of the Act that are not challenged in this action. Section One of the Act prohibits, within 300 feet of a funeral "fighting," "violent, tumultuous or threatening behavior," "unreasonable noise" and the creation of "a hazardous or physically offensive condition." Section Three of the Act prohibits any person from doing any act "tending to obstruct or interfere with" a funeral and prohibits any person from making "any utterance, gesture, or display designed to outrage the sensibilities of the group attending the occasion" when such acts are done with the intent to disrupt a funeral. Section 5(1)(a) of the Act prohibits anyone from blocking, impeding, inhibiting or in any other manner obstructing or interfering with access into or from any building or parking

lot of a building or cemetery where a funeral is being conducted.

It is not reasonable to construe Sections 5(1)(b) and (c) as prohibiting precisely the same kinds of activities that are already prohibited by other sections of the Act. "It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*,534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). Unless Section 5(1)(b) and (c) are superfluous, they must be intended to restrict sounds that are less obtrusive and disruptive than the "unreasonable noise" already prohibited in Section One. Likewise, Section 5(1)(b) and (c) must be intended to restrict sounds and images that are less obtrusive and disruptive than those "designed to outrage the sensibilities" of funeral participants already prohibited in Section Three. Likewise, Section 5(1)(b) and (c) must be aimed at communications that are less obtrusive and disruptive than the acts that tend to obstruct or interfere with a funeral that are already prohibited by Section Three of the Act and the acts that would obstruct or interfere with ingress to and egress from a funeral prohibited by Section 5(1)(a) of the Act.

McQueary, 453 F.Supp.2d at 996-97.

E. Current Issues.

After the Court's order granting preliminary injunction, by Agreed Order (DE 41), the parties agreed to brief two issues. The first issue is whether this case is now moot given that the General Assembly amended the Act to delete the provisions that were subject to the preliminary injunction. The second issue is whether the Plaintiff is a "prevailing party" entitled to attorneys' fees and costs under 42 U.S.C. § 1988.

II. ANALYSIS.

A. Mootness.

"Article III of the Constitution confines the power of the federal courts to adjudication of 'cases' or 'controversies.'" *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 644 (6th Cir. 1997) (citing U.S. Const. art. III, § 2; *Allen v. Wright*, 468 U.S. 737, 750 (1984). "The mootness doctrine, a subset of the Article III justiciability requirements, demands a live case-or-controversy when a federal court decides a case." *Id.*

In *Kentucky Right to Life*, the Sixth Circuit addressed mootness in a case in which, like this one, the Kentucky General Assembly amended the act at issue while litigation regarding the constitutionality of the act was pending. *Id.* at 639. As here, the state argued that the statutory amendments mooted various claims brought by the plaintiff. *Id.* at 644. The plaintiffs argued, as they also argue here, that the claims were not moot "because the Kentucky General Assembly remains free to reenact the prior statutory scheme." *Id.* The Sixth Circuit stated that "[l]egislative

repeal or amendment of a challenged statute while a case is pending on appeal usually eliminates [the] requisite case-or-controversy because a statute must be analyzed by the appellate court in its present form." *Id.* The Court determined that the Plaintiff's challenges to several of the statutory provisions were moot because of the statutory amendments. *Id.*

In doing so, the Sixth Circuit distinguished *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982). In that case, the district court declared that certain language in a city ordinance was unconstitutionally vague. *Id.* at 287-88. While the matter was pending on appeal before the Fifth Circuit, the city revised the ordinance to delete the language at issue. *Id.* at 288. The Supreme Court determined that the case was not moot because "the city's repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated." *Id.* at 289.

However, the Sixth Circuit noted in *Kentucky Right to Life*, that, "[c]ritical to the [Supreme] Court's decision [in *Aladdin's Castle*]. . . was the City's announced intention to reenact the unconstitutional ordinance if the case was dismissed as moot." *Kentucky Right to Life*, 108 F.3d at 645. The Sixth Circuit found this to be an "essential fact, which created the case-or-controversy before the Supreme Court in *Aladdin's Castle*." *Id.*; *see also Brandywine, Inc. v. City of Richmond*, 359 F.3d 830, 836 (6th Cir. 2004) ("[c]ritical to the holding in [*Alladin's Castle*], however, was the fact that legislators had publicly expressed an intention to re-enact the offending legislation").

The Plaintiff argues that this Court should not follow *Kentucky Right to Life* because it is no longer good law in light of *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167 (2000). (DE 43, Pf.'s Brief at 8 n.7; DE 44 Pf.'s Response at 3). In that case, the Supreme Court held that a citizen suitor's claim for civil penalties under the Clean Water Act did not necessarily become moot when, after the litigation commenced, the defendant came into compliance with its permit which imposed limitations on the defendant's discharge of pollutants. *Id.* at 173-74.

The Court noted that, "[i]t is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Id.* at 189 (quoting *Aladdin's Castle, Inc.*, 455 U.S. at 289). This is because, if a defendant can moot an action by voluntarily ceasing the practice in question after litigation has begun, then the defendant is "free to return to his old ways." *Id.*

The Court stated that, to prevent that from happening, a case can become moot by a defendant's voluntary conduct if "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* (quoting *United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199,203 (1968). "The heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Id.* (international quotations and brackets and citation omitted).

The Plaintiff argues that *Friends of the Earth* has implicitly overturned *Kentucky Right to Life*. However, in *Brandywine, Inc. v. City of Richmond*, 359 F.3d 830 (6th Cir. 2004), a case decided after *Friends of the Earth*, the Sixth Circuit determined that the plaintiff's claim for declaratory and injunctive relief was moot, citing *Kentucky Right to Life*. *Id.* at 835-36. In that case, the plaintiff asserted that the city's zoning ordinance was unconstitutional. After the plaintiff filed the action, the city amended the ordinance. *Id.* at 833.

The Sixth Circuit noted that the plaintiff asked the court to declare the zoning ordinance unconstitutional and to prevent the city from enforcing it. *Id.* at 836. The court determined these claims were moot because the court could "neither declare unconstitutional nor enjoin the enforcement of a provision that is no longer in effect." *Id.* As to the plaintiff's claim for money damages, however, the court determined that claim was not moot because, despite the amendment, the plaintiff could seek damages for any losses caused by the enforcement of the challenged ordinance. *Id.*

Brandywine makes clear that *Kentucky Right to Life* remains good law after *Friends of the Earth*.[2]

Furthermore, *Friends of the Earth* is distinguishable from this case in that the defendant in that case was a private party who was charged with

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[2] The Plaintiff also argues that the Court should not follow *Kentucky Right to Life* because its "rationale is flawed." (DE 44, Pf.'s Response at 7). However, because neither the Sixth Circuit Court of Appeals nor the Supreme Court has overruled *Kentucky Right to Life*, this district court must follow it.

not complying with the terms of its permit governing the amount of treated water the defendant could discharge into a nearby waterway. *Friends of the Earth*, 528 U.S. at 175-177. The issue was whether the case became moot by the actions of the private party to bring itself into compliance with the law or whether there was a reasonable expectation that the private party would return to its "old ways." *Id.* at 189.

The defendant in this case, however, like that in *Kentucky Right to Life*, is a government official and the issue, like that in *Kentucky Right to Life*, is whether the case has become moot by the Kentucky General Assembly's amendment of a statute.

The Sixth Circuit has noted that "cessation of the allegedly illegal conduct by government officials has been treated with more solicitude by the courts than similar action by private parties... such self-correction provides a secure foundation for a dismissal based on mootness so long as it appears genuine." *Mosley v. Hairston*, 920 F.2d 409, 415 (6th Cir. 1990) (quoting *Ragsdale v. Turnock*, 841 F.2d 1358, 1365 (7th Cir. 1988)). *See also Ammex, Inc. v. Cox*, 351 F.3d 697, 705 (6th Cir. 2003); *Fed. of Adver. Indus. Representatives v. Chicago*, 326 F.3d 924, 929 (7th Cir.2003) (*Friends of the Earth* standard "is the appropriate standard for cases between private parties, but this is not the view we have taken toward acts of voluntary cessation by government officials . . . we place a greater stock in their acts of self-correction, so long as they appear genuine."); *New England Reg'l Council of Carpenters v. Kinton*, 284 F.3d 9, 18 (1st Cir.2002) ("[u]nder circuit precedent. . .the *City of Mesquite* exception applies 'only where there is a reasonable expectation that the challenged conduct will be repeated following

dismissal of the case.'"); *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 116 (4th Cir.2000) ("we are convinced that *Mesquite* is generally limited to the circumstance. . .in which a defendant openly announced an intention to reenact 'precisely the same provision' held unconstitutional below."); *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1182 (10th Cir.2000) ("the repeal of a challenged statute is one of those events that makes it 'absolutely clear that the allegedly wrongful behavior. . .could not reasonably be expected to recur."); *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir.1994) (same).

In support of his argument that this case is not moot, the Plaintiff cites *Ammex, Inc. v. Cox*, 351 F.3d 697 (6th Cir. 2003). In that case, the state Attorney General issued a Notice of Intended Action ("NIA") to the plaintiff stating that the Attorney General may file an enforcement action against the plaintiff under the state Consumer Protection Act unless the plaintiff ceased certain advertising activity. *Id.* at 700-01. The plaintiff filed suit, asserting that the state statute was unconstitutional and preempted by federal law. *Id.* at 701. While the case was pending before the district court, the Attorney General withdrew the NIA stating that it would not issue a new NIA unless certain "changed circumstances occurred." *Id* at 702. The district court then dismissed the action as moot. *Id.*

In determining whether the case was moot, the Sixth Circuit noted that the Attorney General's withdrawal of the NIA "acknowledges that related litigation is ongoing and might reasonably be expected to lead to the 'changed circumstances'" which would cause a new NIA to be issued. *Id.* at 705. The Sixth

Circuit determined that, because the withdrawal did not make it "absolutely clear that the enforcement action is not reasonably likely to recur," the case was not moot. *Id.* at 705-06.

In this case, however, there is no indication that the Kentucky General Assembly will reenact the deleted provisions of the Act after this case is dismissed. The Plaintiff argues that the fact that the Act passed with overwhelming support in both houses combined with the popular opposition to the WBC's funeral protests make it likely that the General Assembly will reenact Sections 5(1)(b) and (c). The Plaintiff also argues that the fact that the Attorney General has made the argument that the provisions were "necessary" is evidence that the Kentucky General Assembly will reenact them. However, these facts do not raise the likelihood of the reenactment of the provisions above mere speculation, at best. There is simply no reason to question the genuineness of the Kentucky General Assembly's amendment of the Act.

The Plaintiff also cites *Cam I, Inc. v. Louisville/Jefferson County Metro Govt.*, 460 F.3d 717 (6th Cir. 2006). However, in that case, the defendant local government amended the local ordinance in a way that "did not completely remove the alleged harm." *Id.* at 720. Thus, the Sixth Circuit found the amendment did not moot the case because "where the changes in the law arguably do not remove the harm or threatened harm underlying the dispute, the case remains alive and suitable for judicial determination." *Id.* (internal quotations and citation omitted). In this case, the Plaintiff only challenged two provisions of the Act and the amendment to the Act entirely omitted those two provisions.

The Plaintiff also cites *Akers v. McGinnis*, 352 F.3d 1030 (6th Cir. 2004). At issue in that case were certain regulations promulgated by the Michigan Department of Corrections ("MDOC") that were repealed while the case was pending. The Sixth Circuit held that the repeal did not moot the case for two reasons. First, promulgation of the rules was "solely within the discretion of the MDOC." *Id.* at 1035. Thus, the court determined "there is no guarantee that MDOC will not change back to its older, stricter Rule as soon as this action terminates." *Id.* Second, and more importantly, the plaintiff in that case had asserted claims for money damages and the purging of their disciplinary records. *Id.*

This case differs from *Akers* in that reenactment of Sections 5(1)(b) and (c) is not solely within the discretion of one government agency. Instead, it would require action by two houses of the General Assembly, neither of which has indicated a desire to do so. More importantly, however, in this case, the Plaintiff does not seek monetary damages. Instead, he only asked this Court to declare unconstitutional Sections 5(1)(b) and (c) of the Act and to enjoin the state from enforcing them. Because those provisions no longer exist, this case will be dismissed as moot.

B. Attorneys' Fees.

The next issue is whether the Plaintiff is entitled to attorneys' fees under 42 U.S.C. § 1988. That statute provides that, in any action to enforce 42 U.S.C. § 1983, "the court, in its discretion, may allow the prevailing party. . . a reasonable attorney's fees as part of the costs. . . ." 42 U.S.C. § 1988(b). A prevailing plaintiff "should ordinarily recover an attorney's fee

unless special circumstances would render such an award unjust." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quoting S. Rep. No. 94-1011, p. 4 (1976)). "[T]he fee applicant bears the burden of establishing entitlement to an award. . . ." *Id.* at 437.

Plaintiffs are "'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Farrar v. Hobby*, 506 U.S. 103, 109 (1992) (quoting *Hensley*, 461 U.S. at 433. "[A] plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties. . . in a way that directly benefits the plaintiffs." *Id.*

"Even a prevailing party may not be entitled to attorneys' fees if 'special circumstances would render such an award unjust.'" *Deja Vu v. Metropolitan Government of Nashville*, 421 F.3d 417, 422 (6th Cir. 2005) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983)). "But little guidance has been provided by the Supreme Court as to precisely what constitutes a special circumstance that would defeat a fee award, and we have recently opted for a case-by-case approach rather than adopting a 'predetermined formula.'" *Id.* "In that case-by-case inquiry, the burden is on the non-prevailing party to make a strong showing that 'special circumstances warrant a denial of fees.'" *Id.* (quoting *Morscott, Inc. v. City of Cleveland*, 936 F.2d 271, 273 (6th Cir.1991).

In *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001), the Supreme Court held that a plaintiff is not a "prevailing party" where his lawsuit

caused a voluntary change in the defendant's conduct if he does not also secure a judgment on the merits or a court-ordered consent decree. *Id.* at 600.

In that case, after the plaintiff filed suit charging that certain provisions of West Virginia state law violated federal law, the state legislature enacted two bills which eliminated the challenged provisions. *Id.* at 601. In holding that the plaintiff was not a "prevailing party," the Supreme Court rejected the "catalyst theory," pursuant to which the plaintiff is deemed a prevailing party if he "achieves the desired result because the lawsuit caused a voluntary change in the defendant's conduct." *Id.* The Court determined that the catalyst theory was incorrect because it permitted attorney's fees "where there is no judicially sanctioned change in the legal relationship of the parties." *Id.* at 605.

Later, in *Sole v. Wyner*, 127 S.Ct. 2188 (2007), the Court determined that a plaintiff who obtains a preliminary injunction after an abbreviated hearing is not entitled to attorney's fees where the court later denies a permanent injunction after a dispositive adjudication on the merits. *Id.* at 2191. The Court held that "[a] plaintiff who achieves a transient victory at the threshold of an action can gain no award under that fee-shifting provision if, at the end of the litigation, her initial success is undone and she leaves the courthouse emptyhanded." *Id.* at 2192. The Court noted that the fact that the eventual ruling on the merits superseded the preliminary ruling was "[o]f controlling importance." *Id.* at 2195-96. The Court expressly stated that it was not addressing whether a plaintiff may *sometimes* be entitled to attorney's fees where he obtains a preliminary injunction and there is

no final decision on the merits against him. *Id.* at 2196.

This case is different from *Buckhannon* in that the Plaintiff in this case obtained a preliminary injunction prior to the defendant's voluntary cessation of the conduct. And this case is different from *Sole* in that the preliminary injunction was not dissolved before the case became moot. The Court has been unable to locate any Sixth Circuit cases in which the plaintiff was awarded attorney's fees where he obtained only a preliminary injunction before the case was dismissed as moot and the parties have cited no such cases.

The Plaintiff relies on *Duboc v. Green Oak Tp.*, 312 F.3d 736 (6th Cir. 2002). However, in that case, the Sixth Circuit denied the plaintiff's motion for attorney's fees, holding that a plaintiff who obtains a preliminary injunction can only be considered a "prevailing party" if the injunction "represents an unambiguous indication of probable success on the merits, and not merely a maintenance of the status quo ordered because the balance of equities greatly favors the plaintiff." *Id.* at 753 (6th Cir. 2002) (quoting *Webster v. Sowders*, 846 F.2d 1032, 1036 (6th Cir. 1988)).

In that case, the plaintiff charged that the defendant township and its officials had violated his First Amendment rights by retaliating against him for filing lawsuits with regard to certain "certificates of occupancy" he had unsuccessfully petitioned the township to issue to him. *Id.* at 742, 747.

The district court granted the plaintiff an injunction, ordering the township to issue the

certificates of occupancy subject to the plaintiff's compliance with certain conditions. *Id.* at 742. However, the district court later dissolved the injunction and dismissed the plaintiff's complaint. *Id.* at 742-43. The plaintiff sought interim attorney's fees based on the preliminary injunction. *Id.* at 753. Had *Sole* already been decided, the plaintiff in *Duboc* would clearly not have been entitled to attorney's fees.

But, the district court did not have the benefit of *Sole*. Instead, it found that the plaintiff was not entitled to attorney's fees because the injunction was "procedural" and not "an unambiguous indication of probable success on the merits." *Id.* The Sixth Circuit agreed, noting that the injunction was specifically called "temporary, and was only issued subject to [the plaintiff] complying with seven conditions." *Id.* at 754. Further, the Sixth Circuit noted that the plaintiff's goal with the lawsuit "was not to obtain a temporary certificate of occupancy, which the injunction provided, but to seek damages for alleged violations of [the plaintiff's] constitutional rights." *Id.*

Thus, while the court in *Duboc* denied attorney's fees, it also indicated that obtaining a preliminary injunction could, at least in some cases, confer "prevailing party" status on a plaintiff. The Court finds that the preliminary injunction in this case, however, does not render the plaintiff a "prevailing party" for purposes of 42 U.S.C. § 1988.

This case differs from the cases in other circuits relied on by the Plaintiff in which the court found that obtaining a preliminary injunction rendered the plaintiff a "prevailing party." In those cases, the preliminary injunction unambiguously altered the

legal relationship between the parties just as a final judgment does because it "directly benefitt[ed] the plaintiffs." *Farrar*, 506 U.S. at 109. *See*, *People Against Police Violence v. City of Pittsburgh (PAPV)*, 520 F.3d 226, 229-230 (3d Cir. 2008) (plaintiffs who unsuccessfully requested parade permit under city ordinance obtain preliminary injunction prohibiting city from enforcing ordinance); *Watson v. County of Riverside*, 300 F.3d 1092, 1094 (9th Cir. 2002) (plaintiff who was subject of termination hearing obtains preliminary injunction prohibiting county from using incident report in termination hearing); *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939, 940 (C.A.D.C. 2005) (milk producers who would have been subject to an immediate loss of $5,000,000 if new price for Class III butterfat had taken effect obtain preliminary injunction enjoining government from imposing new price).

The preliminary injunction entered in this case, however, did not directly benefit the Plaintiff. In granting the injunction, the Court found that the challenged provisions were likely unconstitutional because they were overbroad. In other words, the Court found that the challenged provisions were constitutionally problematic because they prohibited substantially more communications than those proposed by the Plaintiff. The Court assumed for purposes of the preliminary injunction opinion that the state has an interest in protecting funeral attendees from unwanted communications that are so obtrusive that they are impractical to avoid. But the Court determined that the challenged provisions prohibited substantially more speech than was necessary to protect funeral attendees from such unwanted communications.

The preliminary injunction did not, however, amount to a ruling that the plaintiff was entitled to engage in the communications that he proposed in his Complaint. In fact, it appears that current Kentucky law – which the Plaintiff never challenged – would likely prohibit the activity in which the Plaintiff proposed to engage. The Plaintiff proposed to "congregate, picket, or demonstrate" within 300 feet of a funeral, to make sounds and display images observable or within earshot of funeral participants and to distribute literature near a funeral. The Plaintiff explains that these activities would be conducted as part of a "campaign against homosexuality" and the proposed communications are controversial and offensive and target the funerals of military personnel. (DE 43, Pf.'s Brief at 5, 7).

The Court's ruling does not mean that the Plaintiff can conduct these activities. The Plaintiff is unambiguously prohibited under current Kentucky law from engaging in tumultuous behavior, making unreasonable noise, and creating a "physically offensive" condition at a funeral. He is also prohibited from making "any utterance, gesture, or display designed to outrage the sensibilities of the group" attending the funeral, if such acts are done with intent to prevent or disrupt the funeral. The Plaintiff has not even challenged these provisions of the Act.[3]

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[3] While Plaintiff professes in his Complaint that he has no subjective intent to disrupt the funeral with his activities, his liability for his proposed communications does not depend upon his subjective intent. *See, e.g., Little v. Commonwealth*, 272 S.W.3d 180, 186 (Ky. 2008) (intent can be inferred from a defendant's conduct).

For these reasons, the Court finds that the preliminary injunction in this particular case does not render the Plaintiff a prevailing party under 42 U.S.C. § 1988.

Moreover, even if he were to be considered a "prevailing party" under 42 U.S.C. § 1988, the special circumstances described above warrant the denial of attorney's fees in this action. While the Plaintiff may have obtained a preliminary injunction, the injunction did not directly benefit him. Further, current Kentucky law that was in force throughout this litigation and never challenged by the Plaintiff would appear to likely prohibit much of the communications proposed by the Plaintiff.

For all these reasons, the Plaintiff should not be awarded attorney's fees.

Dated this 26th day of June, 2009.

Signed By:
Karen K. Caldwell /s/ KKC
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT FRANKFORT

CIVIL ACTION NO. 06-CV-24-KKC

[Filed July 14, 2009]

BART McQUEARY,	)
PLAINTIFF,	)
	)
v.	)
	)
JACK CONWAY,	)
in his Official Capacity as Attorney General of the Commonwealth of Kentucky,	)
DEFENDANT.	)

*** *** *** *** ***

JUDGMENT

In accordance with the opinion and order entered in this matter on June 26, 2009, the Court HEREBY ORDERS AND ADJUDGES that:

1) this matter is DISMISSED as moot;

2) this judgment is FINAL and APPEALABLE, and

3) this matter is STRICKEN from the active docket of this Court.

Dated this 14th day of July, 2009.

Signed By:
Karen K. Caldwell /s/ KKC
United States District Judge